IN THE

Supreme Court of the United States

NO. 66

OCTOBER TERM, 1950

ALFRED F. DOWD, AS WARDEN OF THE INDIANA STATE PRISON,
Petitioner

vs.

UNITED STATES OF AMERICA, ex rel.,
LAWRENCE E. COOK,
Respondent

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

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OPINION BELOW

The opinion of the United States Circuit Court of Appeals in this case is set out in the record at pages 203 to 209 thereof and is officially reported in 180 Fed. (2d) 212.

JURISDICTION

The respondent raises no question as to the jurisdiction of this Court in this action.

QUESTIONS PRESENTED

Under this heading of his brief, the petitioner has recited his contentions in the form of four enumerated questions. The first of these really consists of two questions: 1. (a) Is a person confined in prison under a judgment of conviction, who has been *temporarily* restrained by the state from exercising his right of appeal, denied his constitutional right of equal protection under the Fourteenth Amendment?

In answer to this contention respondent maintains that the denial of equal protection was not temporary; that it continued from the time of Cook's incarceration until today.

(b) Even though the restraint extends beyond the statutory period (one hundred eighty days after overruling motion for new trial), during which time he has the right to appeal, does he waive his constitutional right by failing to appeal within one hundred eighty days after the restraint is removed?

In answer to this contention, respondent maintains that there was no waiver of his right of equal protection because:

(a) His right to appeal was in fact never restored;

(b) His right to appeal was fixed within one hundred eighty days of the overruling of his motion for a new trial and, therefore, could never be restored after the lapse of this time;

(c) He had no knowledge at any time that his right to appeal was restored in any manner.

2. Assuming the respondent's rights are in a state of suspense during the period of restraint, and that subsequently the restraint is removed, when does the one hundred eighty day period for appeal commence to run; when the restraint was removed, or when the respondent had knowledge of the fact?

To this contention respondent maintains:

(a) That this is purely collateral to question 1 (b);

(b) Whether or not the right of appeal was restored at any interval is a non-federal question and has never been so decided by the courts of Indiana, but upon the contrary, has been adversely decided to the contention of petitioner.

(c) That knowledge of the fact that the restriction on sending out appeal papers had been lifted after the statutory time for appeal had elapsed was not knowledge that Cook had the right to appeal and hence the time element raised by this question is wholly immaterial.

3. Was the determination of fact made by the Supreme Court of Indiana on respondent's petition for an appeal, filed fifteen years after his conviction, conclusive on the District Court in hearing evidence on the petition for habeas corpus? Was it res adjudicata? To this question respondent maintains:

(a) That the doctrine of res adjudicata is not applicable to denials of petitions for habeas corpus.

(b) That even if it were, there was neither identity of parties or issues in the petition for appeal before the Supreme Court of Indiana and the habeas corpus proceeding before the District Court.

(c) That the hearing on Cook's petition for a belated appeal was not a full and fair adjudication of the federal contentions.

4. Is respondent, imprisoned under a valid judgment of a State Court, entitled to freedom in habeas corpus proceedings in a Federal Court because of a constitutional denial after the judgment?

To this contention respondent maintains that matters occurring after a judgment of conviction in a State Court, which constitutes a denial of equal protection under the Fourteenth Amendment, render the detention illegal and the prisoner entitled to release after exhausting all state remedies in vain.

STATEMENT OF THE CASE

In order to more clearly present the issues, and because of the fragmentary statement in the brief of petitioner, the respondent deems it proper to make his statement of the case.

The respondent, Lawrence Cook, then twenty-one years old, was convicted of murder in the Jennings Circuit Court of Indiana on the 23rd day of July, 1931. On the day after his conviction he was taken to the Indiana State prison. R.p. 178, 179. His motion for a new trial, timely filed, was overruled on October 16, 1931. R.p. 64.

Under the law in Indiana all convicted persons had the absolute right to appeal from criminal convictions within one hundred eighty days from the time of the overruling of their motion for a new trial.

Prior to the time of Cook's incarceration, and continuously throughout the period of his tenure, Daly, the warden of the prison had in force a rule that no prisoner was permitted to send out any legal papers of any sort, including papers relating to appeals. R.p. 34, 35, 36, 48, 52, 56, 66. Shortly after Cook was thus imprisoned, he, with the aid of other prisoners, prepared various legal papers relating to an appeal of his case. These consisted of a petition in forma pauperis for an attorney to represent him on appeal, a petition to have the county furnish him a transcript for appeal, a notice to the prosecuting attorney of his intention to appeal, a praecipe for transcript, an assignment of errors to be used in the appeal and a memory transcript of the evidence. R.p. 66.

These papers were completed long before the one hundred eighty day period for an appeal had passed. R.p. 66, 67. Numerous efforts were made during this time to get the papers sent out of the prison to the proper persons but always Cook was thwarted by the rule against such action.

The time fixed by statute during which Cook had the right to appeal expired on April 15, 1932.

There was no change in the prison rule suppressing papers until sometime after Warden Kunkel supplanted Warden Daly in June, 1933. R.p. 158.

Shortly after Warden Kunkel took office he changed the rule so as to permit prisoners to send out appeal papers and called a meeting so to inform them. This was sometime after June, 1933, and not less than fourteen months after Cook's time for appeal had elapsed. R.p. 158.

Cook testified that he did not remember attending the meeting where it was announced that the rule had been changed but that sometime later he did learn that legal papers could then be sent out. R.p. 69. He then believed, as do his counsel presently, that his *right* to take an appeal from the judgment of his conviction had been irretrievably lost. R.p. 70.

Cook then started preparing papers incident to a petition for a writ of error coram nobis in the Jennings Circuit Court. This was accomplished in 1937. After having the writ granted by one judge, subsequently denied by another, and after appealing to the Supreme Court of Indiana and filing a mandamus action there, all unsuccessful—this phase of his litigation was terminated in March, 1944.

In April, 1945, Cook filed a petition for habeas corpus under the Indiana Statute in the LaPorte Circuit Court of Indiana. This was denied by said court, after examination and without hearing evidence. From this decision Cook appealed to the Indiana Supreme Court. The judgment was affirmed in the case of *State ex rel Cook v. Howard*, 223 Ind. 694; 64 NE 2d 25, on December 13, 1945. In this decision, which turned on jurisdictional grounds, the Supreme Court, for the first time in its existence, announced a new principle relating to appeals, as follows:

> "In aid of its appeliate powers and functions this Court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefor has expired, under the conditions set forth in paragraph one of appellant's complaint, Section 3-2201,

Burns, 1933, but the LaPorte Circuit Court, is without jurisdiction so to do in this action."

A petition for certiorari addressed to this Court was denied on April 22, 1946.

On September 13, 1946, Cook filed a petition in the Supreme Court of Indiana to appeal his original judgment of conviction in response to the language of that court in his habeas corpus case above cited. He made the State of Indiana a party, alleging the facts of the restraint of the prison authorities as here, and supported his allegations by affidavit. To this petition the State filed answer and counter-affidavits. Cook then filed reply and additional affidavits.

Without hearing any witness, without any cross-examination, but only after examination of the papers then filed, the Supreme Court of Indiana on November 26, 1946, denied Cook's petition in an order book entry in the following language:

> "The Court having examined and considered said petition, the answer thereto, and petitioner's reply and all of said affidavits and being duly advised in the premises, finds that the basic allegation of said petition, to-wit: That petitioner's counsel refused, without pay, to take an appeal is not true; and that petitioner is entitled to no relief herein." R.p. 173.

Cook then filed a petition for rehearing which was denied on the 17th day of December, 1946. R.p. 176.

He then filed a petition for certiorari in this Court which was denied March 17, 1947.

On November 13, 1947, he filed his original petition for habeas corpus in the United States District Court which was dismissed by that Court on motion of the petitioner here, and after leave, he filed his amended petition for habeas corpus on October 22, 1948. A motion to dismiss was overruled.

The petitioner here, filed answer and return. This pleading has been omitted in the record filed in the United States Circuit Court of Appeals and in this Court. A copy is made a part of the appendix to this brief. Post p. i.

On the issues thus formed the cause was tried by the District Court which made a finding for Cook and ordered his release. At the time of his release, Cook had been imprisoned 17½ years.

An appeal was duly perfected by the petitioner here and the United States Circuit Court of Appeals affirmed the judgment of the District Court.

For convenience a chronological outline of the facts is set out in the appendix of this brief. Post p. iii.

SUMMARY OF ARGUMENT

Respondent was convicted of murder by State Court. Immediately after conviction he was taken to the State prison where he was confined for seventeen and a half years. Under the law he had a right to appeal from his conviction within one hundred eighty days from the overruling of his motion for a new trial. Within the time allowed and with the aid of fellow-prisoners he prepared appeal papers and petition in forma pauperis for an attorney to represent him on appeal, and also a petition for transcript to be paid for by the State. During all the time allowed for appeal there was a rule at the prison against sending out such papers. As a result he was thwarted in getting papers to proper persons and thereby lost his right of appeal. This right in Indiana is a substantial right fixed by law. All State remedies were exhausted and no question is presented on this issue. No question as to the sufficiency of evidence to sustain the District Court's finding of facts is raised. Under *Cochran v. Kansas*, 316 US 255 and *Ex parte Hawk*, 321 US 114, Cook was released.

Relating to questions 1 and 2 raised by petitioner: After the one hundred eighty day period expired Cook's right to appeal was lost. The right to send out papers after the statutory period elapsed did not revive the right to appeal. Even if the right to appeal was revived, Cook did not waive the constitutional guarantee because he had no knowledge that the right to appeal was restored. Actual, not constructive knowledge is necessary to constitute waiver. The

right to appeal cannot be carved out of any one hundred eighty day period of his imprisonment but commences from the overruling of his motion for a new trial. There was no temporary suspension of his constitutional rights. There was a permanent deprival thereof.

Relating to question 3 raised by petitioner: To contend that the United States District Court was bound by the findings of fact of the State Supreme Court in Cook's petition for permission to appeal is simply effort to adopt to habeas corpus the principal of res adjudicata. Res adjudicata does not apply to habeas corpus. The Court made but one specific finding, —that the basic allegation of the petition, to-wit: That Cook's counsel did not refuse to take an appeal because they were not paid, was not true. This fact is not germane to constitutional question and no other finding was specifically made by the Court. It cannot be assumed that constitutional facts were found against Cook by the Indiana Supreme Court. This proceeding was purely discretionary and non-federal in scope. There was no consideration and adjudication on the merits of his contentions raised in his habeas corpus proceeding. The petition for appeal did not constitute a full and fair adjudication of the federal contentions raised, inasmuch as the matter was purely discretionary in the Court, non-federal in scope, was heard on affidavits exclusively and the Supreme Court of Indiana did not treat the proceeding as any determination of constitutional rights. No written opinion on each question raised by the record, as required by the State Constitution, was made. There was simply an unpublished order book entry in which the Court itself characterized his petition as being for "permission" to appeal.

Relating to question 4 raised by petitioner: Under *Cochran v. Kansas*, 316 US 255, Cook was entitled to freedom upon establishing the allegations of his petition for habeas corpus in the Federal Court. Judge Kerner's dissenting opinion was based on the premise that the State habeas corpus proceeding and the pe-

tition for permission to appeal, fully and completely raised the constitutional questions, and that, therefore, after the denial of certiorari by this Court in each of said proceedings, the District Court should not have assumed jurisdiction. It is respectfully submitted that Judge Kerner erred in his conclusion that either of said proceedings constituted a full and complete hearing of the merits of his constitutional questions. The fact that release of the prisoner was the only remedy available in the United States District Court is no reason for denying that Court the right to hear and determine the merits of the petition.

ARGUMENT

Lawrence Cook proceeded in the United States District Court for the Northern District of Indiana in habeas corpus, seeking his release under a State conviction because his detention was unlawful and in violation of his rights guaranteed under the Fourteenth Amendment to the Federal Constitution—more particularly the equal protection of the laws clause thereof.

He relied primarily on the principles of law announced in the case of *Cochran v. Kansas*, 316 US 255, and the case of *Ex parte Hawk*, 321 US 114.

No question is presented here concerning the exhaustion of State remedies.

No question is presented here concerning the sufficiency of the evidence to sustain the findings of the District Court as to the fact of suppression by the prison authorities throughout the period of time during which Cook had the right to appeal.

The District Court, after hearing all the evidence, among other things, found:

> "Finally, a close analysis of the language in the *Cochrane* case indicates that the only test which the court may apply in a case of this kind is whether the petitioner has been arbitrarily deprived of a right accorded to all other persons in his circumstances in the State of Indiana."
>
> "In other words, the question is whether the petitioner

> has been the object of arbitrary, unreasonable, and oppressive discrimination by the officials of the State, so that his further incarceration is contrary to the prohibitions of the Fourteenth Amendment to the Federal Constitution. The conclusion of the Court is that he has, and that the arbitrary suppression of the papers which he had prepared in an attempt to perfect an appeal was contrary to the Equal Protection Clause of the Fourteenth Amendment." R.p. 181. 182.

This finding is in no way attacked by the petitioner. The United States Circuit Court of Appeals in its opinion confirmed the finding of the District Court as follows:

> "Based upon substantial evidence herein, the district court found that petitioner was deprived by officials of the State of Indiana of his right to appeal his conviction. The Court also properly found that the petitioner has exhausted his State remedies." R.p. 207, 208.

The rights given the citizens of Indiana under our laws which Cook was denied protection of by the prison authorities, are as follows:

1. The right to file his petition in the Court where his case is pending to determine whether or not he is without financial means to employ counsel, and if so, to provide him with counsel at State expense. This right is provided by statute as follows:

> "*Poor person, attorney for.*—Any poor person not having sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefor from such poor person." Burns Ind. Stat. 1933, Sec. 2-211.

In the case of *State v. Spencer*, 219 Ind. 148; 41 N.E. 2d 601, 602, the Court said:

> "In State ex rel White v. Hilgemann, Judge, Ind. Sup.

1941, 34 N.E. 2d 129, we held that under section 13 of article 1 of the Constitution of Indiana the court is required to furnish a pauper defendant with a record which may be used to support an assignment of error on appeal, and furnish him with counsel to perfect an appeal, all at the expense of the county. This was upon the theory that due process requires a fair trial, free from prejudicial error, and the right to a review to correct errors.

"But after there is a final judgment unappealed from, and the time for asserting error has passed, the criminal prosecution in which the accused is entitled to be heard by himself and counsel is terminated, and the constitutional provision is no longer operative."

In *State ex rel White v. Hilgemann,* 218 Ind. 572; 34 N.E. 2d 129, 131, the Court said:

"From what has been said, we must conclude that one accused of crime has the right to be provided with counsel literally 'at every stage of the proceedings,' including the proceedings by which he may seek a review for error by appeal."

2. The right to file a petition in the Court where his case is pending to determine whether or not he is without financial means to have a transcript of the evidence furnished for an appeal, and if so, to have the reporter make such transcript at State expense.

The right is provided by statute, see Burns Ind. Stat. 1933, Sec. 4-3511. (A copy of this statute appears in this brief at post p. ii.

That rights 1 and 2 above enumerated were no hollow rights is apparent from undisputed evidence in the case and not contested by the petitioner. The respondent testified that he and his family were without financial means during the critical time. R.p. 65. Also, Florence Cook, sister of respondent, testified that they were without funds at that time and that, in fact, the attorney's fees for defending her brother in the trial court were collected only by foreclosure of a mortgage on their home. R.p. 62.

3. That the right to review a conviction on appeal is a substantial right in Indiana is shown by the following quotation:

> "Until a person accused of crime has been convicted upon a trial free from error which prejudices his substantial rights, it may be said that he is presumed to be innocent and continues to be merely 'the accused' person referred to in section 13 of article 1 of the Constitution. After he has been convicted, and the judgment has become final, and it has been determined upon appeal that there was no prejudicial error in the trial, or when the time is past and the right to a review for error has been waived, the defendant is no longer 'the accused,' and the 'criminal prosecution' is ended. He then stands convicted, and must be presumed to be guilty unless and until he procures the judgment to be vacated." *State ex rel Cutsinger v. Spencer, Judge,* 219 Ind. 148; 41 N.E. 2d 601, 602, 603.

Also, the following excerpt from the case of *State ex rel White v. Hilgemann,* 218 Ind. 572; 34 N.E. 2d 129, 131:

> "But the mere naked right to a review for error and to have counsel is not sufficient. The right must be made available for the purposes for which it is granted. The right to a review is but a hollow grant to one who cannot provide himself, and is not provided, with counsel, learned and skilled in the law and therefore withholding counsel as a practical matter withholds the right to review, and hence to corrective judicial process, and hence to due process of law."

And further from the same case:

> "When a person is called upon to defend himself against a charge of crime he is presumed to be innocent until his guilt is proven. Our procedure for correcting error upon a trial is by appeal, and is not conditioned upon a preliminary showing of probable error. The reviewing court cannot see whether there is error until the appeal is perfected. It must be assumed that the trial court was not conscious of error or the error would have been corrected there. The review by appeal contemplates an examination of the record to discover whether there was error prejudicial to the defendant's substantial rights. This examination cannot be had until a proper record and a proper assignment of error and a proper brief are presented to this court. If a defendant is denied counsel he is effectively deprived of the right to review contemplated by both Constitutions."

There can be no question but that Cook was denied substantial

rights by the State of Indiana which rights were given to all of her citizens similarly situated. There can be no doubt but that Cook was denied equal protection of the laws of Indiana by the State of Indiana.

The petitioner in his brief admits this conclusion:

> "In the instant case it is admitted that the facts as alleged by Cook would, if true, constitute a violation of the equal protection clause of the Federal Constitution." Petitioner's brief, p. 15.

This is exactly the admission made by the attorney general of Kansas in the case of *Cochran v. Kansas*, 316 U. S. 255:

> "The State properly concedes that if the alleged facts pertaining to the suppression of Cochran's appeal papers 'were disclosed as being true before the Supreme Court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth Amendment.' "

Under the doctrine of *Ex parte Hawk*, 321 U. S. 114, the district court properly heard the petition for habeas corpus and under the evidence properly found a violation of the Fourteenth Amendment and under the law properly released the respondent.

Relating to Petitioners' Questions 1 and 2

The petitioner takes the position that Cook's right to appeal within one hundred eighty days after his motion for a new trial was overruled was only temporarily taken from him by the state and then later restored. He then contends that (a) the fact of the restoration of the right erases the fact of the denial of equal protection, and (b) that because, after the statutory time for appeal had expired the ban on sending out appeal papers was lifted, that Cook's time for appeal then commenced, and having run from that date without an appeal being taken, he had waived his constitutional right of equal protection.

A complete answer to both of these contentions is that Cook's *right* to an appeal was never restored. The statute in force at the time of Cook's entrance in prison and until 1937 was:

> "All appeals must be taken within one hundred and eighty days after the judgment is rendered, or in case a motion for a new trial is filed, within one hundred and eighty days after the ruling on such motion. The transcript must be filed within sixty days after the appeal is taken." Ind. Acts 1927, 421.

Every litigant in civil and criminal suits in Indiana has a *right* to appeal to obtain a review of the judgment rendered against him, so long as he conforms to the statutory requirements, of which the foregoing statute is one.

From the time of the enactment of appeal statutes the courts of Indiana have unbrokenly held that the appellate tribunal had no jurisdiction of an appeal that was taken too late. In this respect there was no distinction between appeals in civil and criminal judgments. *Winsett v. State* (1876) 54 Ind. 437; *Farrell v. State* (1882) 85 Ind. 221; *Farlow v. State* (1924) 196 Ind. 295; *Dudley v. State* (1928) 200 Ind. 398.

If Cook had had a law library available at the time his right to appeal became lost, and had looked up the most recent decision on the subject he would have read:

> "* * * * * * and where the transcript is not filed within sixty days after the appeal is so taken—the time provided by Sec. 16 Ch. 132, Acts 1927—the appellate court does not have jurisdiction of the appeal and it will be dismissed." *Mahoney v. State*, 203 Ind. 200, 204.

Counsel representing the petitioner have recently had occasion to obtain the benefit of this rule in the case of *Johns v. State*, ... Ind. ....; 89 N. E. 2d 281. This decision was handed down December 21, 1949:

> "It appears that this appeal was not perfected within the time allowed by the rule, and, as stated in Brady v. Garrison, 1912, 178 Ind. 459, 460: 'It has been uniformly held by the court that an appeal must be taken within the time allowed by statute, and that unless the transcript and assignment of errors are filed within that time there is no cause in this court. (Citing cases)'

It should be noted that in the above case a futile dissenting

opinion was rendered which included the following caveat:

> "The Indiana courts ought to wash their own judicial linen. It is the duty of this court to see that this is done. We should not leave without a state remedy, wrongs which will have to be corrected in the federal courts.
>
> * * * * * * *
>
> "Society suffers, respect for the law is weakened and public funds are needlessly expended when we deny relief for violations of due process, and force prisoners into federal courts for protection of their rights."

Thus it is manifest that once one hundred eighty days after overruling Cook's motion for a new trial elapsed, his *right* to an appeal forever vanished.

Counsel have completely confused the right to appeal with the right to send out appeal papers. This latter right was restored but only after the right to appeal was extinguished. It was a right which could be restored, the right to appeal was not. No case in Indiana is cited to support petitioner's claim that at any time after April 15, 1932, Cook had the right to appeal. There is no such authority.

In 1940, but not until then, there was developed a doctrine that notwithstanding a statutory curtailment, the Supreme Court, under the Constitution of Indiana, had the right to grant appeals regardless of statutory compliance. This right was in the court and not in the litigant.

The case which first brought forward this idea was in *Warren v. Indiana Telephone Company*, 217 Ind. 93. The Indiana Statute provided for appeals from the Industrial Board being taken to the Appellate Court of Indiana and made no mention of the Supreme Court. The Warren decision overruled former cases holding in effect that the Appellate Court was the court of last resort in compensation cases, saying:

> "It follows from what has been said that this appellant may not be denied his right to present his case to this court for review because the legislature has not provided a means for bringing it here."

In 1941 in *State ex rel White v. Hilgemann*, 218 Ind. 572, the Court, under the authority of the *Warren Case*, in granting mandamus requiring the trial judge to provide counsel for defendant on an appeal from a conviction, said:

> "* * * * The constitution of Indiana guarantees an absolute right to review by this court; that the legislature has the right to regulate and provide procedure for obtaining a review, but not to curtail or deny the right.
>
> * * * * * * *
>
> "This original action was begun within the time allowed for the filing of a bill of exceptions and for perfecting an appeal. There has been delay in determining the questions involved. The relator should not be prejudiced by this delay."

The time for perfecting the appeal was extended sixty days from the filing of the opinion.

The next case in Indiana touching the subject of an appeal after the statutory time had expired was the case of *State ex rel Cook v. Howard*, 223 Ind. 694, decided in 1945. In this case the respondent was the appellant. It was his appeal from an adverse ruling of the LaPorte Circuit Court on petition for habeas corpus filed in that court. The Supreme Court of Indiana affirmed on jurisdictional grouds. Among other things the Court said:

> "If appellant has been denied the privilege of appealing his case, by the warden and employees of the prison where he is serving, until the time allowed by statute for an appeal has expired, that fact would not nullify the judgment lawfully rendered against him by the Jennings Circuit Court. It would merely extend the time for appeal during the period of such disability. In aid of its appellate powers and functions this court has both inherent and statutory power to entertain and determine a petition to appeal after the time allowed by statute therefore has expired, under the conditions set forth in paragraph one of appellant's complaint. Sec. 3-2201, Burns' 1933, but the LaPorte Circuit Court is without jurisdiction so to do in this action."

It is apparent that the law in Indiana at this time was that under certain exceptional circumstances the Supreme Court had

the constitutional right to permit an appeal after the statutory time had elapsed. Manifestly, the petition contemplated would be determined as a matter of grace and not a matter of right in the litigant.

In 1947 the legislature enacted this rule in a statute:

> "9-3305. Supreme Court authorized to permit late appeals.—The Supreme Court of Indiana may, for good cause shown, under such rules as it may adopt or under such orders as it may make in a particular case, permit appeals from a judgment of conviction after the original time for taking an appeal has elapsed." Burns' Stat. 1933, 1949 Supp. P. 51.

Thus it appears that the first time the Indiana Supreme Court informed Cook or any other person in Indiana that any such proceeding as a petition for a belated appeal existed was in 1945, after Cook had been imprisoned for fourteen years. The ray of hope thus held out to Cook, however, was short-lived, as the Supreme Court promptly denied the petition after it was filed. Respondent believes that this long delayed gesture after fourteen years of imprisonment did not and could not nullify the denial of equal protection.

The restraint exercised by the prison authorities has been characterized by the petitioner "temporary." In fact and in effect it has been continuous since 1931 until Cook was released by the judgment of the District Court, during all of which time he was in confinement, a period of seventeen and a half years. This may be "temporary" in terms of geological eras but when measured in the span of human life it is nearly permanent.

The restoration of his right to appeal at the end of the period which was in fact denied him, still meant that he had served more than seventeen and a half years, whereas other citizens had a right to have their appeals determined in due course after they had been perfected under the statute.

Nothing the State could do at that late date would restore equal protection. The right to appeal within one hundred eighty days

does not mean that that period may be carved out of the middle or the end of a sentence being served. It commences with the overruling of the motion for a new trial.

Assume for the purpose of argument that Cook's right to appeal was, as a matter of law, restored upon lifting the restriction sometime after the statutory period had expired. The fact that he did not appeal within a one hundred eighty day period commencing some two years after the denial of his motion for a new trial would not in itself constitute a waiver on his part of the denial of equal protection. Waiver of a constitutional right has been defined as the intentional relinquishment of a known right. In *Johnston v. Zerbst*, 304 U. S. 458, 464, the Court said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Cook testified he believed that after his statutory period for appeal had expired there was nothing further he could do about it. R.p. 70 Par. 120.

True, he knew he could send out legal papers fourteen months after the statutory appeal period had expired but he believed that his right to appeal had been lost. Knowledge on Cook's part that he could send out papers was not knowledge that he could take a belated appeal as a matter of right and could not constitute waiver of that right. The denial of equal protection was at that time an accomplished fact and Cook cannot be held with knowledge anticipating the decision in his case in 1945 to the effect that on petition the Court had the right to grant him a belated appeal as a matter of grace.

In short, the petitioner by his questions 1 and 2 seeks to have the Court hold that Cook waived his constitutional right of equal protection by constructive knowledge of a non-existent law.

Relating to Petitioner's Question 3

The position of the petitioner in this regard seems to be that (a) the Supreme Court of Indiana made a factual determination of the allegations of Cook's petition to appeal; (b) that, notwithstanding, the "Federal District Court has the right to hear and determine if a federal Constitutional right has been violated;" Petitioner's brief P. 14. (c) but that in so hearing and determining the petition the District Court was compelled to adopt the factual findings of the Supreme Court and could only determine the law as applied to those facts.

This contention has the sole merit of being novel. The result would be that the District Court would simply be a court of legal review. This is one of the very objections petitioner makes to the judgment in this case.

However you view this contention it requires the support of the doctrine of res adjudicata in habeas corpus. Res adjudicata does not apply to habeas corpus, and this is true whether it be in relation to the facts alone or the judgment of the Court. This matter has been decided and discussed so many times and so recently that the petitioner is compelled to admit it in his brief. Petitioner's brief, P. 14. *Darr v. Burford,* .... U. S. ...., 94 Law Ed. 511; *Waley v. Johnston,* 316 U. S. 101, 105.

In order to determine what facts were found by the Supreme Court of Indiana and hence what facts the District Court must adopt, the petitioner has been compelled to indulge in speculation in disregard of the words employed by the Supreme Court in its order denying the permission to appeal. The only language in this order relating to any finding of any fact alleged by Cook in his petition is as follows:

> "* * * * finds that the basic allegation of said petition, to-wit: That petitioner's counsel refused, without pay, to take an appeal is not true;" R.p. 173.

Thus, from the language of the order it appears first, the Court found that the "basic allegation" of the petition was the

motive of Cook's trial counsel in not taking an appeal for Cook, and second, the negative finding that that motive was not because of the fact Cook could not pay him. These are the only facts found by the Supreme Court, and even if the District Court had adopted them as found, it could not possibly have changed its finding on the constitutional issues to which these facts were not germane.

It is at this stage of his argument petitioner admits that if the allegations of Cook's petition for appeal or habeas corpus in the District Court were true, there was a denial of equal protection. Petitioner's brief, P. 16. He speculates from this premise that because the Supreme Court denied the petition for appeal it must have found all of the facts material to the constitutional question against Cook. This is definitely a non sequitor. Because of the wide divergence of scope presented by Cook's petition for permission to appeal and the petition for habeas corpus, it seems clear that even if res adjudicata did apply to habeas corpus, it would not be applicable in this case.

Counsel for petitioner further assumes that as a matter of fact the Indiana Court would have granted Cook an appeal if the facts alleged in the petition were found to be true. This is not the case. After all, it was still a discretionary matter and many facts not appearing on the petition or in the affidavits filed, could well have been the reason the court elected to withhold its grace. From the finding actually made it would appear that this was the case and that the Court was not particularly interested in the constitutional aspect, inasmuch as it made no mention of that issue and characterized another issue as the "basic allegation."

One of the affidavits filed by the State of Indiana in that proceeding was the affidavit of Virginia James, the official court reporter who reported the case in which Cook was convicted. In this affidavit she stated it was impossible for her to make a transcript of the evidence at that time because of lost exhibits and inability to then read her shorthand notes. This affidavit appears

in the record at page 137. The injection of this fact into that proceeding certainly had nothing to do with the constitutional question, and yet it might have been the very basis for the denial of the right to appeal.

It is significant that in two cases decided by the Indiana Supreme Court it was held where an appellant in either civil or criminal case cannot procure a transcript of the evidence for appeal because of inability of the official reporter to make the same, that fact alone is sufficient for the Supreme Court to grant the appellant a new trial. *Indianapolis Life Ins. Co. v. Lundquist,* 222 Ind. 359; 53 NE 2d 338; *State v. Bain,* 225 Ind. 505; 76 NE 2d 679.

Once the State of Indiana injected the issue of the inability of the court reporter to provide a transcript, the real question before the State Supreme Court was not whether Cook should be permitted a belated appeal but whether he should be permitted a new trial of his cause without an appeal. It might well have been the Court believed, as does the petitioner in this case, that "a conviction on a retrial under such circumstances is in most cases a practical impossibility." Petitioner's brief, P. 12.

If the Indiana Court decided Cook's petition for appeal "without opinion," as the petitioner characterizes that court's order, surely, under no circumstances, should the District Court be compelled to guess that the turning point of that decision was an adverse finding of facts on the constitutional question. Such a situation is even a stronger case than where this Court is compelled to speculate, on certiorari, the grounds of the State Court's decision. In the case of *White v. Ragen,* 324 US 760, it was held that in absence of specific grounds stated by the Illinois Supreme Court, it was not necessary in the exhaustion of remedies for a prisoner to even file for certiorari because presumptively the decision turned on a non-federal ground.

The respondent believes that the petitioner in his brief has restricted himself to the issue of whether or not the District Court, admittedly having a right to hear Cook's petition in habeas cor-

pus was bound by the finding of fact of the Indiana Supreme Court on the petition for appeal. However, in his brief the petitioner cites the case of *Ex parte Hawk* and states a proposition to the effect that where a state court has considered and adjudicated the merits of petitioner's contention, and this court has either reviewed or declined to review the decision, that a federal court will ordinarily not reexamine upon a writ of habeas corpus the questions thus adjudicated. We believe, notwithstanding petitioner's admission that the District Court had a right to hear and determine the petition for habeas corpus, further discussion of the exact nature of the petition for appeal as applied to the language in the *Hawk Case* should be made.

(a) The first judicial or legislative mention of a petition for a belated appeal came in Cook's own case in 1945. *State ex rel Cook v. Howard*, Supra.

(b) The granting or refusal of such petition was purely a matter of discretion in the Supreme Court. It afforded Cook no right, but merely an opportunity.

(c) There are no rules of court or statutes prescribing the procedure, manner of presentation, or defining any standard of reasons for the court's exercise of discretion.

(d) There is no rule of any kind which gives the petitioner the right to an appeal on any given set of facts, including facts which constitute a violation of the Fourteenth Amendment.

(e) The scope of the entire proceeding is necessarily non-federal in character.

(f) The Court itself did not treat the petition as any other case pending before it since it did not write an official opinion to be published along with all other official opinions, but merely recorded its action by an order book entry.

The Constitution of the State of Indiana, Article 7, Section 5, provides:

> "Decisions in writing.—The Supreme Court shall, upon the decision of every case, give a statement in writing of

each question arising in the record of such case, and the decision of the Court thereon." 1 Burns' R. S. 1933, P. 87.

In writing its order, the Supreme Court characterized the petition as being for *permission* to appeal as follows:

> "The petitioner having filed herein his verified petition for permission to appeal from a certain judgment * * *." R.p. 173.

In view of this constitutional provision and in view of the order book entry as made, it is doubly apparent that the Court itself treated the whole matter as being purely within its grace and not a controversy where legal *rights* of the petitioner were being asserted.

Thus viewing this proceeding it seems very clear that the language in *Ex parte Hawk* concerning a "full and complete hearing of his contentions" was never intended to apply to such a "hearing" as this was. The reasons for such a conclusion are many.

1. The proceeding relating to the discretion of the Indiana Supreme Court to permit an appeal after the statutory period had elapsed is purely non-federal in its scope. Therefore, on petition to this Court, certiorari would be denied and thus this Court would not have an opportunity to review under the existing principles of certiorari. Then if the Federal District Court were bound by facts relating to constitutional violation made by the Indiana Supreme Court, no Federal Court would ever have the opportunity of a full and complete hearing on a federal question. The State courts would then be the sole judges of the inhibitions placed on the States by the Fourteenth Amendment.

2. The language in *Ex parte Hawk* concerning a consideration and adjudication of the merits of his contentions by a State Court, could only apply to a proceeding in the state such as habeas corpus or coram nobis where the petitioner was asserting *rights* concerning the legality of his detention. As distinguished from such a situation Cook's petition for appeal was not the assertion of a legal right he then had, but was merely a recital of reasons seek-

ing to invoke the magnanimity of the Indiana Supreme Court to let him appeal. He was not demanding a right—he was asking a favor.

3. If this Court did not consider permission to appeal a non-federal question and granted certiorari and reviewed the decision of the Indiana Court in this proceeding; and if this Court concluded that equal protection of the laws had been denied Cook, what decision could it write compelling the Court of Indiana, contrary to its discretion, to grant Cook's appeal?

4. Did the language in *Ex parte Hawk* concerning a full and fair adjudication of the federal contentions raised, mean a proceeding involving a question of fact based solely on affidavits? We believe not. While we recognize the fact that federal courts are extreme reluctant to criticize procedure in a state court, yet the rule laid down in *Ex parte Hawk* related to federal procedure in that it discouraged federal courts from hearing habeas corpus when there had been a full and complete hearing in the state, etc. Surely no lesser hearing in the State Court should supplant the mandatory hearing in Federal Courts. In the case of *Walker v. Johnson*, 31 U. S. 284, the Court said:

> "In other circuits, if a issue of fact is presented, the practice appears to have been to have issued the writ, have the petitioner produced, and hold a hearing at which evidence is received. This is, we think, the only admissible procedure. Nothing less will satisfy the command of the statutes that the judge shall 'proceed to determine the facts of the case by hearing the testimony and arguments'."

The present federal statute clearly contemplates evidence, orally or by deposition, in both of which cases the right of cross-examination is preserved. In addition the Court, (meaning Federal Court), may in the discretion of the Judge receive evidence by affidavit where the right to propound written interrogatories of affiant is preserved. This statute certainly does not mean that some State Court could exercise *its* discretion in the use of affidavits which would bind the federal judge even though discretion directed him to avoid their use. U. S. C. A. Tit. 28, Sec. 2246.

5. Asking the Supreme Court of Indiana for permission to get into that court after the statutory right ceased, and asserting the right in the Federal District Court that he was wrongfully deained because his constitutional rights were violated are entirely different cases. The Supreme Court of Indiana was not bound legally or morally in the exercise of its discretion to permit Cook's appeal because his constitutional rights had been violated after his conviction. On the other hand the United States District Court, upon proof of Cook's constitutional rights being violated by the State of Indiana, was bound legally and morally to order his release.

It seems, therefore, that any interpretation of *Ex parte Hawk* which would deny the District Court the right to hear and determine both the facts and the law in Cook's petition for habeas corpus would in effect emasculate the Federal Courts from protecting the rights of citizens denied their constitutional rights.

6. In *White v. Ragen*, 324 U. S. 760, cited by petitioner, the Court in discussing the matter of exhaustion of State remedies as announced in *Ex parte Hawk*, confines the principle of "State adjudication on the merits" to habeas corpus proceedings in the State. If this doctrine were extended to proceedings in the State which were either discretionary under the law of the State or were purely non-federal questions where cartiorari would not be granted, an entirely new and undesirable result would be reached. In such case the decision of the State Court would be final as to federal constitutional questions and this Court would be automatically closed by its own certiorari rule. The Federal District Courts would likewise be closed "ordinary." Obviously the language in *Exparte Hawk* was never intended to be given such a strained construction which would reach so restrictive a result.

Also, the petitioner complains that the District Court in hearing and determining Cook's petition for habeas corpus, was improperly exercising the function of an appellate tribunal. Answer to this contention has been completely and recently made in the

dissenting opinion in the case of *Darr v. Burford,* .... U. S. ....; 94 Law Ed. 511:

> "Even though a petition for habeas corpus in a federal District Court may involve constitutional questions which were found against the petitioner by the highest court of his State, the District Court is not sitting as a court of review of the State Court. A petition for habeas corpus in a federal court, after the State process has been exhausted, 'comes in from the outside,' as Mr. Justice Holmes phrased it in his dissenting opinion in Frank v. Mangum, 237 U. S. 309 * * *, a view which established itself as law in Moore v. Dempsey, 261 U. S. 86 * * *. If it be suggested that as a matter of appearance, legal analysis apart, a federal District Court might be granting relief which the highest Court of the State had denied, the same unanalyzed appearance would attach to a District Court's granting relief after this Court had denied it."

Relating to Petitioner's Question 4.

It is the position of respondent that whenever substantial rights guaranteed a citizen under the Fourteenth Amendment are denied him by a State, and where he has exhausted all State remedies, that a Federal Court in habeas corpus has the right and duty to release him from confinement brought about by the denial of that right. It makes no difference whether the constitutional violation occurred before or after conviction. This is in substance the holding of the Court in *Cochran v. Kansas,* 316 U. S. 244. The right to equal protection does not cease after a conviction. There is no difference from releasing a prisoner unconstitutionally denied counsel *at* the trial and releasing a prisoner who was unconstitutionally denied equal protection *after* the trial. In neither case is the guilt or innocence of the defendant in issue. There is no more reason to believe that a man unconstitutionally denied counsel is innocent than a man who was denied equal protection after conviction. Release after violation of the Fourteenth Amendment is the only means the federal system has of enforcing the Fourteenth Amendment.

Under this question in petitioner's brife counsel have laid great stress on Judge Kerner's dissenting opinion. The respondent respectfully suggests that Judge Kerner was in error when he stated as a reason for his conclusion that by denying Cook's petition for permission to appeal the Supreme Court "held that Cook's imprisonment for the crime of murder was not in violation of the Fourteenth Amendment." This question has been heretofore discussed in respondent's argument.

It is also noted that Judge Kerner stresses the fact that State habeas corpus was denied Cook, affirmed by the Supreme Court of the State, and that certiorari was denied by this Court. It has been held in *Potter v. Dowd*, 146 Fed. 2d 244, that habeas corpus under the statute of Indiana relating thereto is such an inadequate remedy that it is not necessary to exhaust it before proceeding in habeas corpus in a Federal Court. This constricted scope of habeas corpus in Indiana is recognized in *State ex rel Lake v. Bain*, 225 Ind. 505. In view of these holdings it would seem that the State habeas corpus proceeding followed by a denial of certiorari, has nothing to do with this case.

Respondent takes great exception to the extraordinary and drastic relief of freedom granted by the District Court. We respectfully submit it would be more extraordinary and drastic to keep Cook confined the rest of his life when there has been an obvious denial of a substantial right guaranteed him by the Federal Constitution, and after the State of Indiana has continued to deny him that right in every conceivable proceeding he has brought. After all, in all of the efforts Cook has made to either obtain an appeal or to obtain his freedom in Indiana, he has never yet been permitted in any State Court to testify in person or to bring witnesses to testify on his behalf, not to speak of cross-examining adverse witnesses.

To say that the judgment of conviction has never been attacked by petitioner and is valid in all respects is but to beg the question. It is true that no violations of the Fourteenth Amendment occur-

red before judgment. The courts, in rationalizing the right to release on habeas corpus, have frequently stated that the unconstitutional conduct voided the judgment of conviction. When the unconstitutional acts occur after judgment, if broad rationalization is necessary, the Courts can say, with equal logic, that these acts in effect extend back to the rendition of the judgment and make it void. It seems to respondent that the matter should not fall into a class of generalization. The issue is regarding the present detention. If that is made unlawful by unconstitutional acts the only method of enforcing the Fourteenth Amendment is by release of the prisoner. If declaring a judgment of conviction void because of equal protection was denied after its rendition is neither logical nor rational, then logic and rationality alone will open the door to denials of constitutional rights by States after conviction.

The respondent respectfully submits that the denial of Cook's petition for permission to appeal is no barrier to his grant of freedom.

Respectfully submitted,

WILLIAM S. ISHAM,
Attorney for Respondent.

APPENDIX

A

Respondent's Return and Answer

Comes now Ralph Howard, as Warden of the Indiana State Prison, respondent herein, by his attorneys, J. Emmett McManamon, Attorney General, Charles F. O'Connor, Deputy Attorney General, and Merl M. Wall, Deputy Attorney General, and for his return and answer to the writ of habeas corpus says:

1. That he is the duly appointed, acting and qualified Warden of the Indiana State Prison, Michigan City, Indiana, and that he holds custody of the petitioner by virtue of a certain commitment, duly issued out of the Jennings County Circuit Court pursuant to a judgment entered in said court on the 23rd day of July, 1931, legal and valid upon its face, wherein the petitioner was guilty of the crime of first degree murder and was sentenced to imprisonment in the State Prison for the period of his natural life; a copy of said commitment is attached hereto, made a part hereof and marked Exhibit "A."

2. That respondent admits the allegations contained in numerical paragraphs Nos. 3, 4, 10, 11, 12 and 13 of said petition.

3. That respondent denies the allegations contained in numerical paragraphs Nos. 1, 2, 6, 7, 8, 9, 14, 15, 16, 17 and 18 of said petition.

4. That respondent is without information concerning the allegations set forth in numerical paragraph No. 5.

5. That respondent further alleges that he holds custody of the person of the petitioner herein by virtue of the commitment set forth as Exhibit "A" in the first paragraph of this return, and that same is valid upon its face and the term of imprisonment set forth therein has not expired and that petitioner is now lawfully restrained of his liberty by virtue thereof.

WHEREFORE, Respondent requests that the writ herein be dissolved and that the petition be denied and that the custody of the petitioner be remanded to this respondent to be retained by him during the term of said commitment.

J. EMMETT MCMANAMON,
Attorney General
CHARLES F. O'CONNOR,
Deputy Attorney General
MERL M. WALL,
Deputy Attorney Gentral.

B

Indiana Statute

4-3511 (1855). Poor persons—Court may order transcript.—Any poor person desiring to appeal to the Supreme Court or Appellate Court of this state from the decision of any circuit court or criminal court, or the judge thereof, in criminal cases, and not having sufficient means to procure the longhand manuscript or transcript of the evidence taken in shorthand, by the order or permission of any of said courts, or the judge thereof, the court or the judge thereof shall direct the shorthand reporter to transcribe his shorthand notes of evidence into longhand, as soon thereafter as practicable, and deliver the same to such poor person: Provided, The court or the judge thereof is satisfied that such poor person has not sufficient means to pay said reporter for making said longhand manuscript or transcript of evidence, and such reporter may charge such compensation as is allowed by law in such cases for making and furnishing said longhand manuscript, which service of said reporter shall be paid by the court or judge thereof out of the proper county treasury.

C

Chronological Schedule of Facts

July	23, 1931.	Cook convicted. R.p. 178.
July	24, 1931.	Cook taken to Indiana State Prison. R.p. 178.
Oct.	16, 1931.	Motion for new trial overruled. Time the one hundred eighty day period for appeal starts running. R.p. 64.
April	15, 1932.	Time for taking appeal expired. Ind. Acts 1927, P. 421.
June	1933.	New warden (Kunkel) took office. R.p. 158
	1937.	Filed petition for coram nobis.
Apr.	9, 1940.	Warren v. Indiana Telephone Company, decided. 217 Ind. 93.
Nov.	3, 1941.	Indiana Supreme Court affirmed denial of coram nobis. Cook v. State, 219 Ind. 234.
March	17, 1944.	Indiana Supreme Sourt denial of mandate to Jennings Circuit Court, State v. Wilkens, 222 Ind. 365.
Apr.	1945.	Cook filed petition for habeas corpus in La-Porte Circuit Court.
Dec.	13, 1945.	Supreme Court of Indiana affirmed lower court in denial. State v. Howard.
Apr.	22, 1946.	Certiorari denied.
Sept.	13, 1946.	Petition to Supreme Court of Indiana for permission to appeal conviction filed. R.p. 117, 129.
Nov.	26, 1946.	Supreme Court denies petition for appeal. R.p. 173.
March	17, 1947.	Certiorari denied. 330 U. S. 841.
Nov.	13, 1947.	Original petition for habeas corpus filed. R.p. 4.
Oct.	22, 1948.	Amended petition for habeas corpus filed. R.p. 20.
March	10, 1949.	Cook released on order of District Court. R.p. 184.